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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-1280

CONLEY F. MONK, JR., PETITIONER,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before DAVIS, *Chief Judge*, and SCHOELEN, PIETSCH, BARTLEY, GREENBERG, ALLEN, MEREDITH, and TOTH, *Judges.*

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

Before the Court is petitioner Conley F. Monk, Jr.'s, Amended Motion for Leave to File an Amended Petition for Extraordinary Equitable and Collective Relief and Join Additional Parties (Motion). The Secretary has filed an opposition. The Court granted the Motion on January 12, 2018. This order provides the Court's reasoning for its decision to grant the Motion.[1]

I. RELEVANT PROCEDURAL BACKGROUND[2]

On April 6, 2015, the petitioner filed a petition with the Court for extraordinary relief in the nature of a writ of mandamus. The petition sought an order from the Court directing the Secretary to decide certain appeals within one year of the date on which a Notice of Disagreement (NOD) was submitted. In addition to seeking relief for himself, the petitioner also sought to represent a class of similarly situated persons. In other words, he sought to have his petition proceed as a class action in this Court.

A single judge of this Court eventually bifurcated the two claims in the original petition and, with respect to the claim to represent a class, dismissed the petition on the ground that the Court did not have the authority to adjudicate class claims. On appeal, the United States Court of

[1] It is possible to view the Motion as violating Rule 27(e) of the Court's Rules of Practice and Procedure. That Rule generally prohibits a party from including more than one subject in a nondispositive motion. The Court recognizes that its rules are not designed to address situations like this one. Nonetheless, we underscore the importance of following the rules that are in place. And when there is a question about how an action should be taken under existing rules, a party should seek guidance from the Court. In short, rules matter. In any event, to the extent that the Motion violates Rule 27(e), the Court exercises its discretion to waive that Rule. *See* U.S. VET. APP. R. 2.

[2] The Court provides information concerning the procedural history and underlying facts in this matter only to the extent necessary to resolve the pending motion.

Appeals for the Federal Circuit (Federal Circuit) reversed this Court's decision that it did not have the authority to entertain a class action and remanded the matter for further proceedings. *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017). Mandate issued in the Federal Circuit on July 19, 2017. On remand, the Court determined to proceed en banc.

The petitioner has filed a motion to amend his petition seeking a writ of mandamus on behalf of a class. The proposed amended petition would expand the class by removing the condition that the NOD be filed by a person with a medical or financial hardship. In addition, the petitioner seeks to join additional petitioners in this action. The Secretary opposes the Motion, generally arguing that it contains impermissible merits arguments, ignores the Court's Rules of Practice and Procedure and instead advocates for the adoption of trial-level Federal Rules of Civil Procedure, and does not satisfy the criteria for leave to file an amended petition. Respondant's Amended Response in Opposition to Petitioner's Amended Motion (Response).

II. DISCUSSION

Before addressing the Motion, the Court states what is likely obvious to all involved: we are all in uncharted waters. Prior to the Federal Circuit's decision in *Monk*, this Court had held consistently for decades that it lacked the ability to entertain aggregate actions. We now understand that the Court possesses the authority to adjudicate such matters. Whether the Court elects to exercise the authority we now understand we have is not before the Court today. The Court has requested supplemental briefing from the parties and interested amici. The Court will also hold oral argument to consider the many novel and complex issues raised in this case. At present, the Court's Rules of Practice and Procedure do not address motions to amend or the joinder of additional parties in this context. Those omissions make perfect sense because, until the Federal Circuit's decision in *Monk*, the Court did not believe it had authority to hear aggregate actions. The Court is considering adopting procedural rules to address class actions should the Court exercise its discretion to use this device. Until those rules are adopted, the Court must determine what standards to use to address the pending Motion.

There are few examples of appellate courts doing what the Federal Circuit's *Monk* decision calls on this Court to do: engage in procedural actions normally associated with trial courts. But we are not entirely alone in this endeavor. There is one example in particular that provides us with guidance, and pretty good guidance at that. As we all know, the Supreme Court of the United States principally is an appellate tribunal. Although not as well known, the Supreme Court also has original jurisdiction in a narrow set of cases in which it acts as a trial court. U.S. Const., Art. III, Sec. 2.[3]

When the Supreme Court hears cases in its original jurisdiction, it uses the Federal Rules of Civil Procedure and the Federal Rules of Evidence as "guides." U.S. Sup. Ct. R. 17(2) ("The

[3] The second clause of Article III, Section 2 of the Constitution provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects those Rules and the Federal Rules of Evidence may be taken as guides."). This Court will follow the Supreme Court's lead when engaging in activities more suited to a trial-level tribunal than an appellate body. Accordingly, the Court will proceed to address the petitioner's Motion using the Federal Rules of Civil Procedure as a guide.[4]

Having decided the general procedural framework the Court will use, we consider a preliminary matter: should there be any opportunity to amend a petition? The Court will not spend much time on this question. First, as described in detail in the next section of this order, amendments under a wide range of circumstances are an accepted part of federal practice. It would be odd if this Court outright rejected such a commonplace procedure. Second, this Court allows amendments of documents filed in appeals as a matter of course. *See, e.g.*, *Molden v. Peake*, 22 Vet.App. 177, 180 (2008) (granting a motion to amend an EAJA application). Accordingly, the Court proceeds to consider whether this requested amendment should be allowed.

A. General Standard for Motion to Amend

The Supreme Court has recognized that the Federal Rules of Civil Procedure embody a fundamental principle favoring the resolution of actions on the merits. *See, e.g.*, *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014); *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). With respect to amendments, this guiding norm is reflected in Rule 15, providing that a "court should freely give leave [to amend] when justice so requires." FED. R. CIV. P. 15(a)(2);[5] *see also Foman*, 371 U.S. at 182 (recognizing the purpose of liberal amendment and its limitations); *FilmTec Corp. v. Hydranautics*, 67 F.3d 931, 935 (Fed. Cir. 1995) (court should be guided by the underlying liberal-amendment purpose reflected in Rule 15).

In its seminal decision on Rule 15, the Supreme Court operationalized the Rule's pro-amendment ethos by stating that leave to amend should be given in the absence of factors such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment . . . ." *Foman*, 371 U.S. at 182; *see also A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1158 (Fed. Cir. 2014) (following *Foman* formulation).

The Court believes that Rule 15 as interpreted in *Foman* and other cases provides a useful means to address the pending motion. Thus, taking into account the parties' assertions, the Court will address (1) whether there has been undue delay in filing the Motion; (2) whether the petitioner has acted in bad faith or with a dilatory motive; and (3) whether the Secretary would be prejudiced by the amendment.[6]

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[4] To be clear, the Court is not adopting the Federal Rules of Civil Procedure (or the Federal Rules of Evidence) in this order. We merely decide that those Rules may provide guidance to the Court in this instance.

[5] Rule 15(a)(1) deals with when a party in a civil action may amend a pleading without leave of court. Rule 15(a)(2) deals with "other amendments," that is amendments when court action is required. Given the appellate nature of proceedings before this Court, Rule 15(a)(2) is a more appropriate procedure to use as a guide.

[6] The other illustrative factors the Supreme Court noted in *Foman* are not useful in the context of the pending Motion. First, there have been no other amendments so the factor concerning that possibility is factually not relevant.

B. Delay and Burden

Whether an amendment is timely is not a mechanical question. One can canvass the Federal Reporter and end up with no better yardstick than that the answer to "how long is too long to wait to amend" is "it depends." *See generally* J. MOORE, FEDERAL PRACTICE § 15.15 (3d ed. 2010) (summarizing cases). In other words, assessing timeliness requires the Court to consider when the amendment was requested in the context of the facts of this case.

In this case, the original petition was filed over two and a half years before leave to amend was sought. But that is deceptive. For most of this time, the parties were litigating whether this Court had the power to consider class actions. That question was only conclusively determined after the Federal Circuit's decision in *Monk*, for which mandate was entered on July 19, 2017. Within three weeks, the petitioner requested that the Court hold a status conference to discuss amendment and joinder, among other topics. Three days later, the Court stayed the matter and submitted it for en banc consideration.

Generally, given Rule 15's pro-amendment ethos, the party opposing amendment initially bears the burden of showing why the amendment should not be granted; however, once considerable time has passed between the initial filing and the proposed amendment to that filing, some courts shift the burden to the movant to show that the delay was not undue, that is, due to some excusable neglect. *See, e.g.*, *Te-Moak Bands*, 948 F.2d at 1263; *see also Grant v. News Grp. Boston, Inc.*, 55 F.3d 1, 6 (1st Cir. 1995) ("[When] considerable time has elapsed between the filing of the complaint and the motion to amend, the *movant* has the burden of showing some valid reason for his neglect and delay.") (internal quotation marks omitted); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982).

In this instance, the petitioner asserts that the delay in filing his motion for leave to amend his petition is not undue because he previously discussed possible amendment in his August 7, 2017, Unopposed Motion for Status Conference, which he filed less than one month after the Federal Circuit's mandate issued on July 19, 2017, before the Court stayed proceedings on August 10, 2017, and before the Court issued its briefing order on October 26, 2017. Given this case's complex procedural history, the surrounding uncertainty, and that it is unlikely that the petitioner could have known what caselaw applying Rule 15 we would look to for guidance in this case, the Court finds—for purposes of this case—that the petitioner has sufficiently demonstrated that the delay is not undue. Accordingly, this factor does not weigh against allowing the amendment.

Second, the factor concerning the futility of the amendment would, at this point, require the Court to put the cart before the horse. For example, if the Court declines to adopt a class action procedure, the amendment would be futile. The Court declines to prejudge that question—or the merits of the claim—at this preliminary stage. The Court recognizes that the Federal Circuit and other circuit courts consider additional factors, such as the effect of amendment on judicial economy and previous opportunities to amend. *See, e.g.*, *Sanofi-Aventis v. Apotex Inc.*, 659 F.3d 1171, 1183 (Fed. Cir. 2011); *Regents of Univ. of New Mexico v. Knight*, 321 F.3d 1111, 1123 (Fed. Cir. 2003); *Te-Moak Bands of Western Shoshone Indians of Nevada v. United States*, 948 F.2d 1258, 1261-63 (Fed. Cir. 1991); *Tenneco Resins, Inc. v. Reeves Bros., Inc.*, 752 F.2d 630, 634 (Fed. Cir. 1985). We need not here decide which, if any, of such factors the Court may use in the future or whether we will craft additional considerations in other factual circumstances.

Given this conclusion, the Court need not address whether delay alone is sufficient to overcome the liberal amendment approach when there is no prejudice to the non-moving party. *Compare Bjorgung v. Whitetail Resort, LP*, 550 F.3d 263, 266 (3d Cir. 2008) (without prejudice to non-moving party, delay in seeking amendment generally insufficient to prevent amendment); *Laber v. Harvey*, 438 F.3d 404, 426-29 (4th Cir. 2006) (en banc) (even after summary judgment, delay alone insufficient to deny leave to amend in the absence of prejudice to the non-moving party); *Bell v. Allstate Life Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998) ("Delay alone is insufficient justification [to deny amendment]; prejudice to the nonmovant must also be shown."); *Security Ins. Co. of Hartford v. Kevin Tucker Assocs., Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995) (16-month delay in seeking leave to amend insufficient to justify denial in absence of prejudice to non-moving party); *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234-35 (2d Cir. 1995) (noting that delay alone without prejudice to non-movant usually not sufficient to deny amendment in context of a 4-year delay) *with Te-Moak Bands*, 948 F.2d at 1262 ("Delay alone, even without a demonstration of prejudice, has . . . been sufficient grounds to deny amendment of pleadings.").

C. Bad Faith

The second relevant consideration in this case focuses on the petitioner's motivation in seeking an amendment. The Secretary does not assert that the petitioner has acted in bad faith or with a motive to delay these proceedings. However, the Secretary does contend that the petitioner seeks amendment to "tailor[] to and eliminat[e] certain of the Court's concerns" reflected in the Court's October 26, 2017, briefing order. Response at 5. Because the petitioner has indicated since August 2017 that he might seek to amend the petition, the Court has identified no evidence of an improper motive, including the substantive changes in the amended petition the Secretary identified. Accordingly, the Court concludes that this factor in the analysis does not weigh against allowing the amendment.

D. Prejudice

The final relevant factor the Court will consider in this case is whether allowing amendment of the petition would prejudice the Secretary. The prejudice prong is—as with much of this analysis—context specific. As alluded to above, the prejudice question is quite often closely tied to the passage of time. When a party delays in seeking amendment *and* there is some effect on the non-moving party, one will find prejudice. So, for example, if an amendment will require additional discovery, there could be prejudice. *See, e.g.*, *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 604 (4th Cir. 2010) (upholding denial of leave to amend after close of 3-year discovery period); *Johnson v. Methodist Med. Ctr. of Ill.*, 10 F.3d 1300, 1303 (7th Cir. 1993) (amendment denied after 4 years of litigation and discovery period had closed); *see also Bylin v. Billings*, 568 F.3d 1224, 1229-31 (10th Cir. 2009) (noting that prejudice typically found only when amendment unfairly affects the non-moving party's ability to respond to the amendment).

In the case before the Court, there has as yet been no discovery. Indeed, we have not even considered what, if any, discovery will be necessary or be allowed. As the Court noted above, we are all in uncharted waters. The simple fact is that there is no assertion that evidence has been lost. And there is no indication that the Secretary declined to take actions that he would have taken had

this amended petition been filed originally (at least none that he could not take in response to the amended petition).

It is true that the proposed amendment expands the potential class. The original petition defined the class (in relevant part) as being those who filed an NOD, have been waiting more than a year for resolution, and have a medical or financial hardship. The proposed amended petition removes the limiting factor of a medical or financial hardship. But the mere expansion of potential "liability" does not mean that there is prejudice. Moreover, while the class is expanded, the "discovery" necessary to address the amended petition is potentially less burdensome than that required to adjudicate the original petition. For example, the amended petition does not require the parties to address issues related to the medical or financial condition of class members.

Here, the Secretary asserts that he will be prejudiced by the amendment because he has already "expended well in excess of 200 hours" researching issues from the original petition and the Court's October 26, 2017, order. Response at 8. He further argues that the amendment will require him to "reformulate [his] litigation strategy" after spending considerable resources and taxpayer dollars, and "scrap the efforts already undertaken and start over largely from scratch." *Id*. at 6-8. Although the Court recognizes that, under different circumstances, the consumption of considerable government resources may present evidence of prejudice (*see, e.g.*, *Cencast Servs., L.P. v. United States*, 729 F.3d 1352, 1363-64 (Fed. Cir. 2013); *Davis v. United States*, 961 F.2d 53, 57 (5th Cir. 1991)), given the unique chronology of this case, the novelty of the issues being addressed, and the general uncertainty surrounding this case, the Court concludes that the Secretary will not be unduly prejudiced by the amendment.

In the end, the Court concludes that the record does not reflect prejudice to the Secretary by allowing the amendment. As such, the amendment should be allowed.

E. Joinder of Additional Parties

In addition to amending the substantive claims, the petitioner also seeks to join additional persons as petitioners. The Court's Rules of Practice and Procedure currently do not address this specific situation. However, Rule 15 allows amendment to add a party, especially when the addition is not meant to cure a jurisdictional deficiency. *See, e.g., United States ex rel. Precision Co. v. Koch Indus., Inc.*, 31 F.3d 1015, 1018-19 (10th Cir. 1994). The question then becomes what standard should be used to assess this question.

Federal Rule of Civil Procedure 20 generally addresses when more than one party can join together to pursue a claim. The Court concludes that, for purposes of this case, Rule 20 provides a useful standard by which to assess the request to amend here with respect to the joinder of additional petitioners. Generally speaking, Rule 20 allows parties seeking relief to join together if they assert a right to relief "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and there is "any question of law or fact [in] common to all" the parties asserting relief. FED. R. CIV. P. 20(a)(1). "For courts applying Rule 20 and related rules, 'the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.'" *Hagan v. Rogers*,

570 F.3d 146, 153 (3d Cir. 2009) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966)).

Anticipating that the Court might rely on Rule 20, the petitioner asserts that the prospective petitioners share common questions of law or fact and that their claims arise "from the same failed system." Motion at 8-9. Specifically, the petitioner alleges that the proposed petitioners are all claimants who (1) had their claims denied by VA, (2) filed NODs with those decisions, and (3) have waited more than 1 year for resolution of their appeals. *Id.* The petitioner contends that these shared facts also raise a common question of law, namely whether the delay the proposed petitioners have encountered is unconstitutional. *Id.* at 9.

The petitioner next argues that "the prospective petitioners' claims are part of the same series of transactions or occurrences because they all arise from the same unconscionable delays in the appeals process." *Id.* He further argues that, although the prospective petitioners may have filed their claims with VA regional offices across the country, that fact is "legally immaterial." *Id.* at 10 (citing *United States v. Mississippi*, 380 U.S. 128, 142 (1965); *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333-34 (8th Cir. 1974)).

The Secretary argues in part that the Court should deny the petitioner's motion to join additional petitioners "because it requires pre-adjudication of matters to be litigated through the parties' responses to this Court's October 26, 2017, Order. (Oct. 26, 2017, Order, Question 2)." Response at 10. More specifically, the Secretary argues that "[t]he question of commonality for joinder involves the application of the same test used to determine the commonality for class actions." *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011); FED. R. CIV. P. 23(a)(2)).

Based on the allegations in the proposed amended petition, the Court deems the joinder of additional petitioners appropriate. All proposed petitioners claim that a delay in adjudication of their appeals after submission of an NOD is unlawful. Thus, the claims arise out of the same transaction—the processing of NOD appeals. And the petitioners' claims train on a common question—whether the delay in processing their NODs is unlawful. Accordingly, the joinder of additional parties is appropriate. We stress that this determination is independent of any issues that may become relevant in connection with class certification, including whether there are common questions of law or fact present in this case. The decision to join these additional petitioners says nothing about whether a class should be certified in this matter.

F. Other Matters

The Secretary also argues that the Motion should be denied because the briefing on it has allowed the petitioner to circumvent the Court's page limitations imposed in connection with its briefing order. The Court rejects this argument. The petitioner has done no more than attempt to justify his motion to amend in an uncertain environment. In addition, the Court notes that the Secretary sought and received an extension of the page limits the Court initially imposed.

III. CONCLUSION

It is for the reasons set forth above that the Court issued its order of January 12, 2018, granting the Motion.

DATED: January 23, 2018 PER CURIAM.

Copies to:

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